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No. 90-783

In The

Supreme Court of the United States

October Term, 1990

VILLAGE OF LOS RANCHOS DE ALBUQUERQUE and RIO GRANDE VALLEY PRESERVATION SOCIETY,

Petitioners,

v.

R.H. BARNHART, Administrator of the Federal Highway Administration, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT CITY OF ALBUQUERQUE'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the City funded Montaño Project is a major federal action significantly affecting the quality of the human environment or a federal or federally assisted undertaking because the Federal Highway Administration funded a location environmental study, participated in the preparation of an environmental impact statement and approved the final environmental impact statement, which selected the locations of the preferred alternative alignments.

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RESPONDENT CITY OF ALBUQUERQUE'S[1] BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In 1977, the Urban Transportation Planning Policy Board of the local Council of Governments requested a

[1] Respondent is a political subdivision of the State of New Mexico and has no parent companies, subsidiaries or affiliates.

feasibility study of alternative river crossings in the Albuquerque metropolitan area. The study focused on the engineering feasibility of the alternatives, with some attention to environmental impacts. As a result of this study, in 1979, the Policy Board initiated the preparation of an Environmental Impact Statement ("EIS") and identified three principal corridors, including the Montaño and Paseo del Norte corridors, for particular consideration. The Policy Board requested the New Mexico Highway Department to serve as lead agency to coordinate the potential cooperative efforts of City, County, State and Federal agencies concerned with transportation projects.

The Federal Highway Administration ("FHWA") programed federal financial assistance of $58,972.50 for studies and technical tasks related to the EIS, took an active part as a study team member in the preparation of the EIS and reimbursed the New Mexico Highway Department $48,113.00 for studies and tasks related to the EIS.

In 1984, the FHWA issued its Record of Decision which approved the final EIS and authorized the Montaño and the Paseo del Norte projects, which were approved as the preferred alternative alignments, to proceed to the next stage of development as federal aid highway projects. The Record of Decision provides that the "Federal Highway Administration Division office will monitor the project . . . if Federal-aid Highway funds are used for its construction". Federal involvement in the preferred alternatives ended at this point, because the City of Albuquerque ("City") and the State of New Mexico determined that there were essentially no federal funds available for the Montaño and Paseo del Norte

projects. The City and the State chose not to seek any federal money to build either the Paseo del Norte or the Montaño bridges.

In 1983 and 1985, when the possibility of federal funds failed to materialize, the voters of Albuquerque approved the issuance of municipal general obligation bonds in the total sum of $10.3 million to fund the estimated $10 million cost of the Montaño Project. The City has completed the design of the Montaño Bridge and has begun right-of-way acquisition. The Federal Highway Administration has played no part in any of these activities.

The City does not intend to apply for or use any financial, technical or other assistance from the FHWA or the State of New Mexico to complete the Montaño Project. The Petitioners acknowledge that the Montaño Project will be constructed with City funds (Petition, p.12) and that the Montaño Project is a local project (Petition, p.43).

REASONS WHY THE WRIT SHOULD BE DENIED

1. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THE OTHER CIRCUITS.

A. National Environmental Policy Act of 1970 ("NEPA"), 42 U.S.C. § 4331 *et seq.*

The Tenth Circuit held that the contribution of nearly $59,000.00 to the cost of the EIS and the approval of the EIS by the FHWA and eligibility of the Montaño Project for federal funds are not sufficient to establish a major federal action requiring compliance with NEPA.

Petitioners rely primarily on *La Raza Unida v. Volpe*, 337 F.Supp. 221 (N.D. Cal. 1971), aff'd, 488 F.2d 559 (9th Cir. 1973), cert. den., 417 U.S. 968 (1974), to demonstrate that the Tenth Circuit's decision conflicts with the decisions of other circuit courts. *La Raza* held that NEPA applies to a project when the FHWA grants location approval. In the instant case, in accordance with the *La Raza* precept, an EIS was prepared before the general Montaño alignment was approved by the FHWA.

In *La Raza*, the court was concerned with identifying the point at which NEPA obligations begin, not when they might end. The district court specifically declined to address "whether the federal protective devices would continue to apply if the state forecloses the possibility of federal assistance". 337 F.Supp. at 231, n.5.

Once the federal government participates in a project, the project is not necessarily forever federal. *City of Boston v. Volpe*, 464 F.2d 254 (1st Cir. 1972); *Ely v. Velde*, 497 F.2d 252, (4th Cir. 1974) (a prison project, which was originally to have been funded with federal money, was not a federal project because the State withdrew its request for funds before construction had begun and before the federal government had spent money on any phase of the project).

The funding by the FHWA of the planning process of a project is not a major federal action. *Atlanta Coalition on Transportation Crisis, Inc. v. Atlanta Regional Commission*, 599 F.2d 1333 (5th Cir. 1979) (federal assistance to the planning process is not a commitment of the federal government to fund the project); *Citizens for Balanced Environment and Transportation v. Volpe*, 376 F.Supp. 806

(D.Conn. 1974), aff'd, 503 F.2d 601 (2nd Cir. 1974), cert. den., 423 U.S. 870 (1975) (the expenditure of less than $50,000.00 of FHWA funds for planning a proposed road was insignificant to render a multi-million dollar highway a federal action).

The approval of an EIS is acceptance of the general project location. 23 C.F.R. § 771.113(b) (1985, 1990). The approval of an EIS, as location approval, is not an action that has significant effect on the environment, *Maryland Wildlife Federation v. Dole*, 747 F.2d 229 (4th Cir. 1984), or a federal action, *Jette v. Bergland*, 579 F.2d 59 (10th Cir. 1978). It is a considered discussion of the environmental consequences of proposed action that the agency may or may not take. If the agency neither takes the proposed action nor in any way aids others in taking it, it makes no sense to continue imposing NEPA obligations. See *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975), cert. den., 424 U.S. 927 (1976).

Location approval does not commit the FHWA to approve federal funds for a project, 23 C.F.R. § 771.113(b) (1990), or obligate local governments to accept federal funding, 23 U.S.C. § 145. In *Citizens for Balanced Environment, supra*, the court refused to follow *La Raza, supra*, and held that neither a location approval, nor its equivalent (known as "route revision approval"), irrevocably committed the federal or state governments to FHWA funding or, consequently, to NEPA duties:

> [N]either step commits the state to build the highway at all, nor to use federal funds if the highway is built, and surely neither step commits the agency to supply federal funds. Moreover, determination of whether the federal

> government is sufficiently involved in a highway to make it a "federal action" within the meaning of NEPA should not depend on the state of mind of the potential state applicant for funds. 376 F.Supp. 812.

The possibility of future federal funding does not make a project a federal action. *City of Highland Park, supra; Bennett v. Taylor,* 505 F.Supp. 800 (M.D.La. 1980). Where the planning process is structured or a project is designed to preserve the eligibility for federal funding, the possibility of future federal funding does not make a project a federal action. *Historic Preservation Guild of Bay View v. Burnley,* 896 F.2d 985 (6th Cir. 1989); *Atlanta Coalition on Transportation, supra; Friends of the Earth v. Coleman,* 518 F.2d 323 (9th Cir. 1975); *Citizens for Balanced Environment, supra.*

Because the Montaño Project will be built with City funds, the FHWA cannot reimburse the City for the cost of the Montaño Project. The FHWA does not pay for completed projects that were not subject to FHWA monitoring and approval before and during construction. See 23 U.S.C. § 114(a) and § 121(c); and 23 C.F.R. § 1.9(a) (1987). NEPA cannot apply to the Montaño Project. *Bennett, supra.*

In *Citizens Civic Association of Door County v. Coleman,* 417 F.Supp. 975 (W.D. Wisc. 1976), the FHWA participated in the planning process of a project to preserve the state's eligibility for federal funds in the event the state should seek federal aid; provided guidance for and participated in the preparation of the EIS; approved the location of the preferred alternative and approved the design of the approach roadways to the project. The state did not seek,

program, or authorize federal aid for preliminary engineering, right-of-way, or construction. The Court held that the project had not become a federal action.

In other cases relied on by Petitioners, the project in issue had proceeded, with federal approval and funding, through the design phase and to construction or the evidence showed that the decision to proceed without those funds was a deliberate attempt to circumvent NEPA's requirements. *Scottsdale Mall v. State of Indiana*, 549 F.2d 484 (7th Cir. 1977), cert. den., 434 U.S. 1008 (1978) (design, preliminary engineering and right-of-way acquisition); *Indian Lookout Alliance v. Volpe*, 484 F.2d 11 (8th Cir. 1973) (no dispute that state seeking federal funding); *City of Boston v. Volpe, supra*, (FAA allocated more than $1 million for taxiway construction); *Named Individual Members of San Antonio Conservation Society v. Texas Highway Department*, 446 F.2d 1013 (5th Cir. 1971), cert. denied, 406 U.S. 933 (1972) (deliberate attempt to circumvent NEPA by shifting funds). Congress subsequently rejected the Fifth Circuit's suggestion in *San Antonio, supra*, that a project could remain federal for the purpose of NEPA even if the State repaid all of the federal funding. The Federal Aid Highway Act of 1973 provided that the North Expressway in San Antonio, which had been the subject of *San Antonio*, would cease to be a federal aid highway program when all funds theretofore paid to the State by FHWA had been returned. When Texas had repaid the funds, the Fifth Circuit held that the North Expressway was exempt from the application of NEPA. *Named Individual Members of San Antonio Conservation Society v. Texas Highway Department*, 496 F.2d 1017 (5th Cir. 1974), cert. den., 420 U.S. 926 (1975).

B. Section 4(f) of the Department of Transportation Act 49 U.S.C. § 303 and of the Federal Aid Highway Act, 23 U.S.C. § 138.

In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), the Court stated that Section 4(f) prohibits the use of federal funds to finance the construction of highways through public parks if feasible and prudent alternatives exist. Section 4(f) does not apply to the Montaño Project because the City has funded the construction of the Montaño Project through municipal general obligation bonds and will not seek any federal funds for the project.

C. National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470 *et seq.*

NHPA applies to a project only if the project is under the direct or indirect jurisdiction of a federal agency or licensed or assisted by a federal agency. 36 C.F.R. § 800.2(O) (1987, 1989). The Montaño Project is not under the jurisdiction of the FHWA. There is no dispute that the City can build the Montaño Project without FHWA involvement. The FHWA has not issued any licenses for the Montaño Project.

NHPA is not applicable unless federal funds are approved to aid in construction of a project. *River v. Richmond Metropolitan Authority*, 359 F.Supp. 611 (E.D. Va. 1973), aff'd 481 F.2d 1280 (4th Cir. 1973); *Hall County Historical Society v. Georgia Department of Transportation*, 447 F.Supp. 741 (N.D. Ga. 1978) (compliance with NHPA

was not required if the state withdrew requests for federal funds for project construction and reimbursed federal funds that had been expended); *Hart v. Denver Urban Renewal Project*, 551 F.2d 1178 (10th Cir. 1977) (under NHPA, the key element is federal funding, not federal approval); *Edwards v. First Bank of Dundee*, 534 F.2d 1242 (7th Cir. 1976) (no NHPA duties if no federal funding); *Weintraub v. Rural Electrification Administration*, 457 F.Supp. 78 (M.D. Pa. 1978) (to same effect). The fact that a project is eligible for federal funding does not make it subject to NHPA. *Historic Preservation Guild, supra.*

The analysis under NHPA is essentially the same as the analysis under NEPA. *Ringsred v. Duluth*, 838 F.2d 1305 (8th Cir. 1987) (treating NHPA's "undertaking" requirement as essentially coterminous with NEPA's "major federal action" requirement); *Bennett, supra.* If the FHWA participation in the Montaño Project is not a major federal action under NEPA, it is not a federal or federally assisted undertaking under NHPA.

2. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE ISSUE OF COMPLIANCE BY THE CORPS OF ENGINEERS WITH FEDERAL ENVIRONMENTAL LAWS.

In their second reason for the grant of a writ, Petitioners assert that the Montaño Project is a major federal action because the FHWA knew that the City would have to obtain a Section 404 dredge and fill permit from the Corps of Engineers to build the Montaño Bridge.

A. The FHWA has no authority to issue Section 404 permits. The Secretary of the Army, acting through the

Chief of the Engineers, has the exclusive authority to issue Section 404 permits. 33 U.S.C. § 1344. The Secretary of the Army and the Corps of Engineers are not parties to the instant case.

B. The issue of whether the Secretary of the Army properly issued a Section 404 permit for the Montaño Bridge is the subject of separate litigation, *Village of Los Ranchos v. Hatch*, No. CIV 88-1032JC (D.N.M.), Nos. 90-2012, 90-2026, 90-2052 (10th Cir.) (pending) (Petition, p.70a).

C. The issue of whether the issuance of a Section 404 permit is a major federal action was not presented below and is not within the scope of the decision below. The facts of record do not support the formulation or resolution of this issue.

D. The FHWA is not obligated to prepare an EIS for issuance of a Section 404 permit.

E. The federal environmental laws do not apply until there is a major federal action or federal undertaking. The instant action was filed on August 31, 1984. The Corps of Engineers issued the Section 404 permit for the Montaño Bridge on July 6, 1986. If the FHWA participation in the Montaño Project was not a major federal action or undertaking, the subsequent issuance by the Corps of Engineers of a Section 404 permit for the Montaño Bridge cannot make the prior FHWA action a major federal action or undertaking.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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